A

SERAMAN A ADIPAN

v.

PP

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COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
HASAN LAH JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: J-05-102-2005]

C

23 MARCH 2009

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against conviction and sentence - Post-mortem - Whether cause of death unclear - Dying declarations - Identification of deceased - Doubt as to*

D

how injuries suffered by deceased came about - Accused's explanation - Whether trial judge erred in law and in fact - Whether conviction safe

EVIDENCE: *Dying declaration - Admissibility - Oral and written statements of deceased - Whether deceased's thinking process impaired by*

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morphine-based painkillers - Whether deceased could have been suffering from "Korsakoff Syndrome" - Whether dying declarations could form basis of conviction

CRIMINAL PROCEDURE: *Defence - Explanation by accused - Accused charged with murder of deceased - Whether story of accused that*

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deceased killed himself highly implausible - Conduct of accused at material time

This was an appeal by the appellant against the decision of the High Court convicting him of the murder of the deceased and

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sentencing him to death under s. 302 of the Penal Code ('Code'). The appellant raised the following grounds of appeal: (i) the trial judge erred in law and in fact in accepting the evidence of PW15, the government doctor who had conducted the post-mortem on the deceased. It was submitted that the cause of death of the

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deceased was not clear since PW15 did not conduct a full post-mortem on the deceased's body; (ii) the trial judge erred in law and in fact in accepting the dying declarations of the deceased that the appellant doused him with petrol and then set him alight. It was further averred that at the time of making the dying

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declarations, the deceased was heavily sedated with morphine-based painkillers that could have impaired his thinking process and that he could have been suffering from "Korsakoff Syndrome"; (iii)

the deceased was never identified; and (iv) there was doubt as to how the injuries suffered by the deceased came about. There was no other evidence besides the dying declarations to show that it was the appellant who poured petrol on the deceased and set him alight. Both of them were drunk and there was a doubt as to whether they were in a proper frame of mind. The appellant contended that the deceased had set himself alight because his wife was having affairs with other men. The appellant tried to help the deceased but he could not because he was drunk, and he got frightened and ran away.

Held (dismissing the appeal, and affirming the conviction and sentence of the High Court)
Per Hasan Lah JCA delivering the judgment of the court:

(1) PW16, the doctor who attended to the deceased in Segamat Hospital, estimated that about 80% of the deceased's body was burned and there were no other injuries. When the deceased was transferred to Malacca Hospital, PW16's prognosis was that there was a very low chance of survival for the deceased. PW15 said she conducted an external examination on the deceased's body and found more than 70% burns. There were no other injuries. She did not conduct an internal examination because she was of the view that the cause of death was clear *ie*, major burns over 70% of the body and major complications. Under cross-examination she disagreed that the cause of the deceased's death could be something else. This court was of the opinion that this ground of appeal was without substance. The trial judge had properly considered the evidence before him and had come to the right conclusion. There was ample evidence to support that finding of fact. (paras 33, 34 & 35)

(2) The trial judge had properly admitted the oral and written statements of the deceased. The appellant's contention that the deceased was heavily sedated with painkillers that could have impaired his thinking process and he also could have suffered from "Korsakoff Syndrome" could not be accepted. When the deceased made his statement to Detective Selvaraj Murugan ('PW10') he was not referred to PW16 yet and that time there was no evidence to suggest that he had been given morphine-based painkillers. His statement to PW10 and the statements he later gave to the other witnesses were

A consistent. As such, it could not be said that the deceased's thinking process was impaired because of the morphine-based painkillers. The trial judge had made a finding of fact that the deceased had the capacity and clarity of mind to remember the facts and details. The defence's own witness, DW4, stated
B that a person could not suffer "Korsakoff Syndrome" from burns. The defence did not ask PW16 any question on this during cross-examination. For the above reasons, the dying declarations in this case were reliable and true, and could form the basis of a conviction. (paras 48 & 49)

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(3) There was no merit in the appellant's contention that the deceased was never identified. The trial judge had stated in his judgment that the deceased was identified to PW15 by Inspector Osthman Mantaha, PW8, who had met the
D deceased when he was still alive in the hospital, and also by all the material witnesses. (para 50)

(4) The trial judge was correct in finding that the appellant's story that the deceased killed himself because of matrimonial
E problems was highly implausible. In coming to that finding, the trial judge had also taken into consideration the appellant's conduct at the material time. The appellant left the deceased at the scene and drove to his sister's house two kilometres away. His house was only 150 meters away from the scene.
F If the appellant's contention were true, then the most sensible thing for the appellant to do was to help the deceased or to immediately inform his neighbours or the police about the incident. When PW7, the deceased's wife, gave evidence, the defence did not ask her whether she and the deceased had
G marital problems. The appellant would not have run away from the scene and left the deceased alone if he were innocent. His conduct only revealed that he was the assailant of the deceased. Thus, the trial judge was justified in disbelieving the appellant's story that the deceased killed himself. (paras 52 & 53)

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(5) Upon careful perusal of the trial judge's judgment, his finding of facts and the application of the law, it was clear that he committed no errors. He was right in convicting the appellant on the charge under s. 302 of the Code. (para 55)

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Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi menyabitkannya atas pembunuhan si mati dan mengenakan hukuman mati ke atasnya di bawah s. 302 Kanun Keseksaan ('Kanun'). Perayu membangkitkan alasan-alasan rayuan yang berikut: (i) hakim perbicaraan khilaf dalam undang-undang dan dalam fakta apabila menerima keterangan PW15, iaitu doktor kerajaan yang telah melakukan post-mortem atas si mati. Ia telah dihujahkan bahawa apa yang menyebabkan kematian si mati tidak jelas kerana PW15 tidak melakukan satu post-mortem penuh atas badan si mati; (ii) hakim perbicaraan khilaf dalam undang-undang dan dalam fakta apabila menerima akuan nazak si mati bahawa perayu telah menuangkan petrol ke atasnya dan selepas itu membakarnya. Ia dihujahkan lagi bahawa pada masa membuat akuan nazak itu, si mati diberi sedatif penghilang kesakitan berasaskan morfin yang boleh menjejas proses pemikirannya dan beliau mungkin menghidapi "Sindrom Korsakoff"; (iii) si mati tidak pernah dikenalpasti; dan (iv) terdapat keraguan berkenaan dengan bagaimana kecederaan yang ditanggung oleh si mati terjadi. Tidak ada keterangan lain selain daripada akuan nazak itu untuk menunjukkan bahawa ia adalah perayu yang telah menuangkan petrol atas si mati dan membakarnya. Kedua-dua mereka mabuk dan terdapat keraguan mengenai sama ada mereka berada dalam keadaan fikiran yang sesuai. Perayu menghujah bahawa si mati telah membakar dirinya kerana isterinya mempunyai hubungan sulit dengan lelaki-lelaki lain. Perayu cuba menolong si mati tetapi tidak dapat berbuat demikian kerana beliau mabuk, dan beliau menjadi takut dan melarikan diri.

Diputuskan (menolak rayuan, dan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) PW16, doktor yang merawat si mati di Hospital Segamat, menganggar bahawa lebih kurang 80% badan si mati telah dibakar dan tidak ada kecederaan lain. Apabila si mati telah dipindah ke Hospital Malacca, prognosis PW16 ialah bahawa terdapat kemungkinan yang sangat rendah bagi si mati selamat. PW15 mengatakan beliau melakukan suatu pemeriksaan luaran atas badan si mati dan menjumpai lebih daripada 70% kebakaran. Tidak ada apa-apa kecederaan yang lain. Beliau tidak melakukan suatu pemeriksaan dalaman kerana beliau

berpendapat bahawa apa yang menyebabkan kematian adalah jelas, iaitu, kebakaran serius melebihi 70% badan dan komplikasi serius. Di bawah pemeriksaan balas beliau tidak setuju bahawa apa yang menyebabkan kematian si mati mungkin perkara lain. Mahkamah ini berpendapat bahawa alasan rayuan ini tidak mempunyai substans. Hakim perbicaraan telah mengkaji dengan patut keterangan di hadapannya dan telah mencapai kesimpulan yang betul. Terdapat keterangan yang banyak untuk menyokong dapatan fakta itu.

(2) Hakim perbicaraan telah menerima dengan betul pernyataan-pernyataan lisan dan bertulis si mati. Penghujahan perayu bahawa si mati telah diberi sedatif menghilang kesakitan yang menjejas proses pemikirannya dan beliau mungkin juga menghidap "Sindrom Korsakoff" tidak boleh diterima. Apabila si mati membuat pernyataannya kepada Detektif Selvaraj Murugan ('PW10') beliau belum dirujuk kepada PW16 lagi dan pada masa itu tiada keterangan untuk mengatakan bahawa beliau telah diberi penghilang kesakitan berasaskan morfin. Pernyataannya kepada PW10 dan pernyataan-pernyataan yang beliau kemudian memberi kepada saksi-saksi yang lain adalah konsisten. Oleh yang demikian, ia tidak boleh dikatakan bahawa proses pemikiran si mati terjejas disebabkan penghilang kesakitan berasaskan morfin. Hakim perbicaraan telah membuat satu dapatan fakta bahawa si mati mempunyai kapasiti dan kejelasan minda untuk ingat fakta-fakta dan butir-butiran. Saksi pembelaan sendiri, DW4, menyatakan bahawa seorang tidak boleh mengalamai "Sindrom Korsakoff" daripada kebakaran. Pembelaan tidak tanya PW16 apa-apa soalan mengenai perkara ini dalam pemeriksaan balas. Oleh kerana sebab-sebab di atas, akuan nazak dalam kes ini adalah boleh dipercayai dan benar, dan boleh menjadi asas bagi suatu sabitan.

(3) Tiada apa-apa merit dalam hujahan perayu bahawa si mati tidak pernah dikenalpasti. Hakim perbicaraan telah menyatakan dalam penghakimannya bahawa si mati telah dikenalpasti kepada PW15 oleh Inspektor Osthman Mantaha, PW8, yang telah bertemu dengan si mati apabila beliau masih hidup lagi di hospital, dan juga oleh semua saksi-saksi material.

(4) Hakim perbicaraan betul apabila mendapat cerita perayu bahawa si mati cuba membunuh diri kerana masalah perkahwinan adalah sungguh tidak munasabah. Dalam mencapai dapatan itu, hakim perbicaraan telah menimbangkan kelakuan perayu pada masa yang material itu. Perayu telah meninggalkan si mati di tempat kejadian itu dan memandu ke rumah kakaknya sejauh dua kilometer dari sana. Rumahnya hanya 150 meter dari tempat kejadian itu. Jikalau hujahan perayu adalah betul, perkara yang paling munasabah yang perayu boleh buat ialah menolong si mati atau untuk memberitahu jiran-jirannya ataupun polis tentang insiden itu. Apabila PW7, isteri si mati, memberi keterangan, pembelaan tidak tanya beliau sama ada beliau dan si mati mempunyai masalah perkahwinan. Perayu tidak mungkin lari dari tempat kejadian itu dan membiarkan si mati seorang diri jika beliau tidak bersalah. Kelakuannya hanya mendedahkan bahawa beliau merupakan penyerang si mati. Oleh itu, hakim perbicaraan berjustifikasi apabila tidak mempercayai cerita perayu bahawa si mati telah membunuh diri.

(5) Setelah membaca dengan teliti penghakiman hakim perbicaraan, dapatan-dapatan fakta beliau dan penggunaan undang-undang, ia adalah jelas bahawa beliau tidak melakukan apa-apa kekhilafan. Beliau adalah betul dalam menyabit perayu atas tuduhan di bawah s. 302 Kanun.

Case(s) referred to:
Sunny Ang v. Public Prosecutor [1965] 1 LNS 171 ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Evidence Act 1950, s. 32(1)(a)
Penal Code, s. 302

For the appellant - Stanislaus Vethanayagam; M/s MS Vethanayagam & Assoc
For the respondent - Awang Armadajaya Awang Mahmud DPP

[Appeal from High Court, Muar; Criminal Trial No: 45-13-2002]

Reported by Suresh Nathan

JUDGMENT

Hasan Lah JCA:

[1] We heard this appeal on 13 October 2008 and unanimously dismissed it. We now give the grounds of our decision.

[2] The appellant appealed against his conviction in the High Court at Muar of the murder of one Muniandy a/l Karupiah for which he was sentenced to death under s. 302 of the Penal Code. The charge against the appellant is as follows:

> Bahawa kamu pada 19.07.2001 jam antara 9.30 malam hingga 10.57 malam di hadapan warong tidak bernombor di Jalan Mutiara 1, Taman Mutiara, Bukit Siput, di dalam daerah Segamat, di dalam Negeri Johor Darul Takzim dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian Muniandy a/l Karupiah No. KP A1514193, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[3] The relevant evidence for the prosecution for the purpose of this appeal as accepted by the learned trial judge was as follows. PW4, Eariyanaidu a/l Mallanaidu, testified that he had known the deceased since 1998. He last saw the deceased on 19 July 2001, when he was with six or seven persons, amongst whom were the deceased and the appellant, drinking in a liquor shop at Bukit Siput, Segamat from 8.30pm to 9pm. At about 9pm when he wanted to go home the appellant gave him a lift in the appellant's car. Inside the car PW4 sat on the rear passenger seat. The deceased was seated on the front passenger seat, next to the appellant, who was driving the car. PW4 alighted at his house and the appellant drove off with the deceased.

[4] At about 9 or 10am on 20 July 2001, PW4 went to Segamat Hospital to visit the deceased whom he heard had suffered burns. At the hospital PW4 asked the deceased how the incident happened and according to PW4 the deceased told him that the appellant wanted to borrow RM50 from him and that a quarrel ensued when the deceased refused to lend the money to the appellant. The deceased said that "Jayaraman menyimbah minyak dan terus bakar". The deceased was conscious when he related that story to PW4. Under cross-examination, PW4 said that the wife of the deceased was present when the deceased related this story to him.

[5] PW5, Thambusamy a/l Rangasamy, testified that he was a petrol pump attendant at the Caltex Petrol Station, Segamat Baru. In 2001, he had known the deceased for about four or five years. He last saw the deceased at about 9pm on 19 July 2001, when the deceased came in a car with the appellant, who was driving the car, to his petrol station. After filling his car with RM20 of petrol the appellant drove off with the deceased. About half an hour later, the appellant returned to his petrol station. On that occasion, he did not see the deceased. The appellant bought RM2 of diesel in a container. On the next day, he heard that the deceased had been burnt.

[6] PW6, Arumugam a/l Ramasamy, testified that exh. P9 (1-8) were pictures of his stall. His stall was opened daily for business from 7am to 12noon and he would clean his stall when he closed for the day. According to him the bottle in exh. P9(8) was not from his stall.

[7] PW7, Kornalmary a/p Raju, was the wife of the deceased. She testified that at about 8.30pm on 19 July 2001 the deceased came to her place of work and told her that he wanted to go out but he did not say with whom. Later, at about 11pm the police came to her house and asked her to go to Segamat Hospital. At the Segamat Hospital she saw the body of the deceased was all burnt. When she asked the deceased for the cause the deceased told her that "Jayaraman jirus dengan petrol dan bakar dengan mancis." At that time the deceased was conscious and was able to talk.

[8] According to PW7 the deceased also told the police officers present that "Jayaraman bakar saya". PW8 (Inspector Osthman bin Mantaha) and PW9 (D/Kpl Parthasaradhy Naidu a/l P. Krishnan) were the police officers who were present. PW8 recorded the statement of the deceased.

[9] PW7 further stated that in the morning of 20 July 2001 PW4 visited the deceased and the deceased spoke to PW4. She heard the deceased told PW4 "Jayaraman bakar saya". The deceased was conscious when he spoke to the police and PW4.

[10] At about midday on 20 July 2001, the deceased was transferred to Malacca Hospital. At the Malacca Hospital the deceased could no longer speak. PW7 was with the deceased when the deceased passed away at about 9.40pm.

[11] PW8 testified that at about 11.05pm on 19 July 2001 he was informed of the first information report regarding the deceased's case. He then instructed detective Selvaraj a/l Murugan (PW10) to go to Segamat Hospital to identify the victim and to make inquiries. He then together with PW9 and detective Mohd Rosli bin Hj. Mustapha proceeded to the scene of the incident which was at PW6's stall located in Taman Cempaka, Bukit Siput. They arrived at the place at about 11.40pm. PW8 recovered a liquor bottle, a shirt with the brand "Ronstyle", and a pair of slippers. There were spillage marks on the ground and there was burnt material near the spillage marks. PW8 collected samples of the spillage marks and the burnt material.

[12] On the instruction of ASP Gan Chip Pho (PW14) he went to the Segamat Hospital to record statement from the deceased with PW9 acting as an interpreter. According to PW8 the deceased answered all the questions and signed the statement. The deceased was in pain, but he was conscious and his answers were rational. It took about half an hour to record the statement from the deceased.

[13] PW10 testified that at about 11.05pm on 19 July 2001 he was instructed by PW8 to go to Segamat Hospital to make inquiries about the case. At the emergency ward he met the deceased who told him that his friend by the name of Jayaraman had poured petrol on him and burnt him. PW10 also asked the deceased of the whereabout of the appellant. PW10 said that the body of the deceased was blistered but his speech was normal.

[14] At about 4.05am on 20 July 2001, PW10 arrested the appellant at a road junction in Taman Perling Segamat.

[15] PW11, Nik Mohd Azmi bin Husin testified that at 12.30pm on 20 July 2001 he was instructed by PW14 to assist in the investigation of the case. He, together with a police party and the appellant went to PW6's stall. He found two bottles under a wooden bench. One of the bottles smelt of petrol. He took possession of that bottle.

[16] PW13, Vijentiran a/l Karunakaran, is the step-son of the deceased. He testified that the shirt recovered at the scene was the shirt he gave to the deceased. He purchased the shirt in the year of 2000.

[17] PW12, Chong Sip Seng, is a government chemist. He testified that he found traces of petrol in the bottle. He, however, could not find any trace of hydrocarbons in the other exhibits he examined.

[18] PW15, Dr. Syakirah bte Shamsudin, is a government doctor. She testified that she was supposed to conduct the post-mortem on the deceased on 21 July 2001. She only conducted external post-mortem on the deceased who suffered 70% burns on his body. There was no other injuries. According to PW15 an internal post-mortem was not done as the cause of death was clear, namely, major burns over 70% of the body and major complications. The major complications were acute renal failure. The kidneys could not function. Renal failure is a complication caused by major burns. The chances of survival from 70% burns are slim. She certified the cause of death as major burns with acute renal failure.

[19] PW16, Dr. Teoh Wei Teck, is also a government doctor. He testified that at about 12.30am on 20 July 2001 the deceased was admitted into his ward. At that time the deceased was fully alert and conscious and could answer his questions. The deceased was stable and able to speak clearly. The deceased complained of severe pain and asked to be relieved of his pain. The whole body of the deceased, from face to legs, were burnt. There were no other injuries. He estimated that about 80% of the body of the deceased was burnt. He put the deceased on an intravenous drip and he gave injections and antibiotic. He also gave morphine-based painkillers. According to PW16, at 12.45am the deceased told him that someone had poured petrol on him and then had set him on fire with matches. PW16 also confirmed that PW8 took statement from the deceased at about 1am. At that time the deceased was still conscious and still able to speak and was alert.

[20] At the conclusion of the case for the prosecution the learned trial judge held that the prosecution has made out a *prima facie* case against the appellant. The appellant was accordingly ordered to enter on his defence.

[21] In his defence the appellant stated that he and the deceased were close friends. On 19 July 2001 he and the deceased went to the liquor shop in his car. While they were drinking at the liquor shop PW4 and a Malay person arrived. So they all drank together. He and the deceased sent PW4 home. On

their way home they stopped at the Caltex petrol station to fill petrol. According to the appellant at the said petrol station the deceased invited him to drink liquor at a stall. So they went to the stall (ie, PW6's stall). At that stall they drank two bottles of liquor which the deceased had bought earlier. They threw away the two empty bottles at the said stall.

[22] The appellant further stated that while they were drinking at the stall the deceased asked him to buy diesel. So he went to buy diesel and brought it back to the stall and gave it to the deceased. The deceased told him that the deceased's wife was having affairs with other men. The deceased then poured the diesel onto his body and said he wanted to die. The appellant told the deceased not to do that. The deceased then took a box of matches from his pocket and set himself alight.

[23] The appellant said that he tried to help the deceased but he himself was not stable as he was drunk. He was scared and so he drove his car to his sister's house in Taman Perling, Paya Pulai. He told her of what had happened. His sister then called his brother Krishnan who came to the house after that. Krishnan made a call to Segamat police station and spoke to a policeman by the name of "Selva". Krishnan brought him in Krishnan's car to a junction where they met Selva. They then followed Selva to the police station where the appellant was arrested.

[24] DW2, Supuluchmy a/p Adipan, is the sister of the appellant. She testified that at 12.30am (she could not remember the date) the appellant came to her house and told her what had happened to the deceased. The appellant was drunk. After that her son, Ramesh, and her brother, Raja, brought the appellant to the police station.

[25] DW3, Krishnan a/l Adipan, is the brother of the appellant. In his evidence he said that in July 2001 at about 12 midnight he met with the appellant at DW2's house. The appellant was drunk. The appellant told him of what had happened. DW's son, Ravi, made a call to the police station and spoke with Selva. Selva asked them to bring the appellant to the police station.

[26] DW4, Dr. Michael Jeyakumar Devaraj, is a medical doctor and a specialist in internal medicine. He also handled burn cases. His evidence could be summarised as follows. It is a normal

practice to categorise burn cases by percentage of the surface involved. 70% burns are serious cases, and the statistics from the United States in 1970's and 1980's indicated a survival rate of 20-30%. The survival rate in Malaysia would be worse. In the case of 70% burns, if death occurred within 48 hours, the cause of death would be damage to the respiratory system or shock due to loss of fluids. If within the next 48 hours death would be due to kidney failure or due to the earlier causes. After 4 days, infection would be an additional cause. A post-mortem would pin point the cause of death and would exclude other causes such as pancreatic or heart attack, or pre-existing kidneys problems. DW4 also stated that it is possible that a patient under the influence of morphine-based painkillers could be confused. In his opinion the probable cause of death of the deceased was due to hypovolemic shock as a result of the loss of fluid from the circulating system of the body. An open post-mortem could exclude other causes and establish that it was due to hypovolemic shock, most conclusively.

[27] Under cross-examination DW4 said that the best person to speak on the cause of death would be the doctor who attended to the patient and the doctor who conducted the post-mortem. The burns in the instant case were a mixture of full and partial burns. In both partial and full burns, there would be loss of fluids, which fluids if not replaced adequately would result in renal failure. In burn cases, toxins are released into the blood and toxins block up the kidneys. He also said that the probable cause of death in the instant case was burns.

[28] At the conclusion of the trial the learned trial judge held that the appellant had not raised a reasonable doubt in the prosecution case and that the prosecution had proved its case beyond reasonable doubt against the appellant. This is what the learned trial judge said in his judgment:

> In the final analysis, the defence came down to a bare assertion, which failed to cast any reasonable doubt on guilt. If at all, the accused only further substantiated that the deceased was absolutely clear headed when he gave his written statement to PW8 and PW9. In the evaluation of the prosecution case, it was found that practically all facts asserted by the deceased in his written statement were substantiated by other witnesses and by the silent evidence. There was however one fact asserted by the deceased that other witnesses and the silent evidence failed to shed further light. In his written statement, the deceased said "Pada

masa itu, Jayaraman telah bersungut tentang pemasangan plug di Restoran Thulga, di Bukit Siput yang mana beliau silap pasang, lalu digelak oleh beberapa anak perempuan kedai/restoran tersebut." And under cross-examination, the accused agreed that there was a Restoran Thulga and that about a week before the incident he was laughed at by the female staff of that restaurant, totally substantiating what the deceased had said. There could be no question about it. The word of the deceased was as good as gold.

At the end of the entire case, the accused had not raised a reasonable doubt on guilt. Rather, it was found that the guilt of the accused had been proved beyond all reasonable doubt. Accordingly and for the reasons aforesaid, the accused was convicted and sentenced to be hanged by his neck until he is dead.

[29] We now deal with the issues raised by the appellant's counsel in this appeal. There are several grounds of appeal. For the first ground the appellant contended that the trial judge erred in law and in fact in accepting the evidence of PW15. Learned counsel for the appellant submitted that the cause of death of the deceased was not clear as PW15 did not conduct a full post-mortem on the deceased body. He then referred to the evidence of Dr. Michael Jeyakumar Devaraj (DW4) who said that a post-mortem would pinpoint the cause of death and would exclude other causes.

[30] In response to that the learned deputy public prosecutor submitted that the failure to conduct a full post-mortem on the deceased was not fatal to the prosecution case because there was no doubt as to the exact cause of death of the deceased. Learned deputy public prosecutor referred to the decision of the Federal Court in *Sunny Ang v. Public Prosecutor* [1965] 1 LNS 171 where although the deceased's body was never found the court held that the overwhelming evidence pointed to the fact that the deceased died and that the appellant caused her death.

[31] On this issue the learned trial judge made the following finding of fact in his judgment:

... and that there was no doubt whatsoever that the cause of death was certified by PW15, who as a doctor know about burns, an external injury which need no pathologist to unravel.

[32] It is to be observed that DW4 has also stated in his evidence that 70% burns are serious cases and the statistics from the United States in the 1970's and 1980's indicated a survival rate of only 20% - 30% and the survival rate in Malaysia would be worse. Under cross-examination DW4 said that the best person to speak the cause of death of the deceased was the doctor who attended to the patient and the doctor who conducted the post-mortem. DW4 further said that the most probable cause of the deceased's death was burns.

[33] PW16 was the doctor who attended to the deceased in Segamat Hospital. His evidence was that the deceased was badly burned and he estimated that about 80% of the deceased's body was burned. There were no other injuries. At 11am on 20 July 2001 when the deceased was transferred to Malacca Hospital his prognosis was that there was a very low chance of survival for the deceased.

[34] PW15 said she conducted external examination on the deceased body and she found there was more than 70% burns. There were no other injuries. She did not conduct internal examination because she was of the view that the cause of death was clear which was major burns over 70% of the body and major complications. Under cross-examination she disagreed that the cause of the deceased's death would be something else.

[35] In our opinion this ground of appeal is without substance. The learned trial judge has properly considered the evidence before him and has come to the right conclusion. There was ample evidence to support that finding of fact. Under the circumstances we, as an appellate court, would not interfere with the trial judge's finding of fact who had the advantage of seeing and evaluating the witnesses.

[36] The second ground of appeal by the appellant relates to the dying declarations made by the deceased. Learned counsel for the appellant has submitted that the learned trial judge erred in law and in fact in accepting the dying declarations of the deceased. In his dying declarations the deceased said the appellant doused him with petrol and then set him alight. Learned counsel submitted that in the first information report (exh. P11) it was stated that "ada seorang ... telah bakar dirinya" and there was no evidence

of petrol at the scene. He further submitted that at the time of making of the dying declarations the deceased was heavily sedated with morphine-based painkillers which could impair his thinking process. Also, according to DW4, the deceased could suffer from "Korsakoff Syndrome".

[37] It is to be noted that in the High Court the appellant's counsel also submitted that a dying declaration could not be cross-examined and as such the court should be cautious in admitting it. Section 112 of the Criminal Procedure Code must be complied with before a dying declaration could be admitted. The prosecution should investigate all facts stated in the dying declarations and reveal the investigation before the dying declarations could be admitted.

[38] The purpose of adducing dying declarations of the deceased was to show that the death of the deceased was brought about by an act of the appellant as there was no eyewitness to the incident. In his judgment the learned trial judge said that three witnesses (PW4, PW7 and PW10) testified that the deceased said that Jayaraman doused him with petrol and then set him alight, while two witnesses (PW8 & PW9) testified that they recorded the deceased's statement stating that "tiba-tiba Jayaraman tuang minyak ke muka saya ... dan Jayaraman bakar saya pakai mancis sambil berkata "mati engkau ..."

[39] The prosecution introduced the dying declarations pursuant to s. 32(1)(a) of the Evidence Act 1950 where it provides that when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death come into question, such a statement is relevant whether the person who made it was or was not at the time it was made under expectation of death.

[40] In this case the deceased made the statement to several persons. The prosecution adduced the dying declarations of the deceased through the oral evidence of the witnesses who heard the deceased making the dying declarations as well as through a statement given by the deceased under s. 112 of the Criminal Procedure Code. The deceased made the dying declarations while he was being treated in the Segamat Hospital. With regard to the condition of the deceased at the time he made the dying

declaration to PW8 the evidence of PW16 shows that the deceased was fully alert and conscious. According to PW16 the deceased was brought to his ward at about 12.30 in the morning of 20 July 2001. At that time the deceased was fully alert and conscious and could answer PW16. The deceased complained of severe pains and he was able to speak clearly. PW16 also said in his evidence:

> Muniandy said to me, at about 12.45 a.m., that someone had poured petrol on him and then had set him on fire with matches.
>
> At about 1.00 a.m. SP8 arrived at ward 7. (SP8 dicamkan) SP8 asked for my permission to take a statement from Muniandy. I gave that permission.
>
> SP8 saw Muniandy at that time. Muniandy was still conscious and still able to speak, and was alert. After SP8 had left, I attended again to Muniandy at about 1.30 a.m. Muniandy was still alert and fully conscious.

[41] It is to be noted that PW16's evidence was not challenged by the defence as he was not cross-examined on this.

[42] PW8 also in his evidence stated that while giving his statement under s. 112 of the Criminal Procedure Code the deceased was conscious and was able to speak clearly.

[43] PW10 went to see the deceased at about 11.30pm in the emergency ward which was before the deceased was brought to PW16's ward. According to PW10 at that time the deceased told him that his friend, Jayaraman, doused him with petrol and set him alight. PW10 said:

> Semasa temubual, keadaan mangsa badan semua melecur, tetapi cakap biasa ada kesakitan dalam keadaan boleh faham, boleh jawab.

[44] PW7, the wife of the deceased, who went to the hospital after being informed by the police about the incident said in her evidence:

> ... Sampai di wad, saya lihat badan suami semua terbakar. Saya bertanya suami bagaimana boleh jadi macam itu. Suami jawab "Jayaraman jirus petrol dan bakar mancis." Itu sahaja yang suami kata.

A Suami masih dalam keadaan sedar, dia masih boleh bercakap. Dia masih kenal saya. Semasa saya bercakap dengan suami, ada ramai anggota polis di tepi katil.

[45] In the statement given to PW8 under s. 112 of the Criminal Procedure Code the deceased said that:

B

... Tetapi apabila sampai di warong tersebut, tiba-tiba Jayaraman terus tuang minyak ke muka saya. Pada masa itu mata saya sangat pedih dan Jayaraman bakar saya pakai mancis, sambil berkata "matilah engkau."

C

[46] The learned trial judge, after having carefully considered the evidence and the law relating to the dying declaration, admitted the deceased's dying declarations. The learned trial judge held that:

D

The condition in section 32 is that the statement or statements by the deceased must relate to the "cause of his death, or as to any of the circumstances of the transaction which resulted in his death". The alleged oral statements by the deceased to PW4 was "Jayaraman menyimbah minyak dan terus bakar" (see page to of the Notes of Proceedings), to PW7 was "Jayaraman jirus dengan petrol dan bakar dengan mancis (see page 16 of the NP), to PW10 were "kawan bernama Jayaraman telah menyiram petrol dan terus membakar ... menyiram petrol atas simati dan terus bakar" (see page 34-35 of the NP), and to PW16 were that someone had poured petrol on him and then had set him alight with matches. Now given that the cause of death was burns while the alleged statements recounted the act that caused those burns and also named the person who did it, it was plain that all alleged statements by the deceased to PW4, PW7, PW10 and PW16 related to the cause of death. It was also plain that the alleged written statement by the deceased also related to the cause of death, as the statements "tiba-tiba Jayaraman terus tuang minyak ke muka saya ... dan Jayaraman bakar saya pakai mancis sambil berkata 'matilah engkau' ..." also recounted the act that caused those burns and also named the person who did it. The condition that the statements of the deceased must relate to the cause of his death, or to any of the circumstances of the transaction which resulted in his death, was clearly met and satisfied.

E

F

G

H

That left the question as to whether those statements were indeed made by the deceased.

I

[47] The learned trial judge also held that: A

> The deceased was not tutored, and in his statement the deceased showed he had the capacity and clarity of mind to remember facts and details. More importantly, the deceased was accurate. In addition, the deceased was entirely consistent. It had to be, that it was absolutely safe to accept the oral and written statements of the deceased. B

[48] We are of the view that the oral and written statements of the deceased have been properly admitted by the learned trial judge. C

We are unable to accept appellant's contention that at the time of making of the dying declarations the deceased was heavily sedated with painkillers which could impair his thinking process and he could also suffer from "Korsakoff Syndrome." It is to be noted that when the deceased made his statement to PW10 he was not referred to PW16 yet and at that time there was no evidence to suggest that he had been given morphine-based painkillers. Yet his statement to PW10 and the statements he gave later to the other witnesses are consistent. As such how could it be said that the deceased's thinking process was impaired because of the morphine-based painkillers. The learned trial judge has made a finding of fact that the deceased had the capacity and clarity of mind to remember facts and details. With regard to "Korsakoff Syndrome" the defence's own witness, DW4, stated that a person could not suffer "Korsakoff Syndrome" from burns. No question was asked by the defence to PW16 on this during cross-examination. D E F

[49] For the reasons given above we hold that the dying declarations in this case are reliable and true and could form the basis of a conviction. There was overwhelming evidence to show that the deceased was fully conscious and mentally alert when he gave the statements to the witnesses. G

[50] With regard to the appellant's contention that the deceased was never identified we also found that there was no merit in that. The learned trial judge has stated in his judgment that the deceased was identified to PW15 by PW8 who had met the deceased when he was still alive at the hospital and that the deceased was identified by all the material witnesses. H I

[51] The next issue raised by the appellant was that there was doubt as to how the injuries suffered by the deceased came about. There was no other evidence besides the dying declarations to show that it was the accused who poured petrol on the deceased and set him alight. Both of them were drunk. There was a doubt as to whether they were in proper frame of mind. The accused said that the deceased set himself alight because his wife had affairs with other men. The appellant tried to help the deceased but he could not because he was drunk. He got frightened and ran away.

[52] On this point the learned trial judge made the following finding:

> The story that the deceased killed himself because of matrimonial problems should not only be seriously doubted for the above reasons but could be further labelled as a recent invention, for the defence had not given any notice of the entire defence story. The entire defence was sprung for the first time when the accused took to the stand. Before that, only the defence knew the defence story. The accused had definitely kept his defence up his sleeve, and weight must be detracted from the implausible defence.

[53] We agree with the finding of the learned trial judge. In coming to that finding the learned trial judge has also taken into consideration the appellant's conduct at the material time. The appellant left the deceased at the scene and he drove to his sister's house which was 2 kilometres away. His house was only 150 metres away from the scene. If what was said by the appellant that the deceased killed himself because of the matrimonial problems was true then the most sensible thing for the appellant to do was to help the deceased or to immediately inform his neighbours or the police about the incident. When PW7 gave evidence the defence did not ask her whether she and the deceased had marital problems. If the appellant was innocent he would not have ran away from the scene and left the deceased alone. His conduct would only reveal that he was the assailant of the deceased. As such the learned trial judge was justified in disbelieving the appellant's story that the deceased killed himself.

[54] The learned trial judge has carefully considered in totality both the prosecution case and the defence case and he was satisfied that the prosecution has proved the guilt of the appellant beyond all reasonable doubt as the defence has not raised any

doubt to the prosecution case. We observed that what were raised by the appellant in this appeal are mainly concerned with the trial judge's finding of fact. In that respect we, as an appellate court, are guided by a well-settled principle. In *Sainal Abidin Mading v. Public Prosecutor* [1999] 4 CLJ 215, this court stated at p. 227 that:

> We would reiterate that an appellate court should be slow to disturb the finding of facts of a trial court unless such findings are not supported by the evidence or are against the weight of the evidence. Similarly, when it comes to the credibility of witnesses, a trial court is in a better position to assess their credibility as an appellate court is not in a position to do so (*Dato Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232).

[55] Having carefully perused the judgment of the learned trial judge and his finding of facts and the application of the law, we are satisfied that he committed no errors. Neither are we, after considering the submissions of the appellant's counsel and the deputy public prosecutor, convinced that the learned trial judge was wrong in convicting the appellant on the charge under s. 302 of the Penal Code. In the circumstances, the appeal was dismissed and we affirmed the conviction and the sentence.